2012 APAAC Summer Conference

August 1 - 3, 2012
Westin La Paloma Resort
Tucson, Arizona

DROP AND GIVE ME TWENTY: Constitutional Law Update

Presented By:

RICHARD WINTORY
AZ Assistant Attorney General
Tucson, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Ste. 202
Phoenix, Arizona 85015

SUMMARY OF THE 2011 – 2012

U.S. SUPREME COURT DECISIONS

FOR TRIAL DOGS

Summaries of Opinions and Cases Granted Review by the NAAG Supreme Court Project

Dan Schweitzer, Director
750 First St., N.E., Suite 1100
Washington, D.C. 20002
DSchweitzer@NAAG.ORG

By: Richard M. Wintory
Office of the Arizona Attorney General

Table of Contents

United States v. Alvarez. The Stolen Valor Act makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved. 18 U. S. C. §§704 (b), (c).Respondent pleaded guilty to a charge of falsely claiming that he had received the Medal of Honor, but reserved his right to appeal his claim that the Act is unconstitutional. The Ninth Circuit reversed, finding the Act invalid under the First Amendment.

Held: The judgment is affirmed. Pp. 3–18.

617 F. 3d 1198, affirmed. JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR, concluded that the Act infringes upon speech protected by the First Amendment. Pp. 3–18.

(a) The Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft* v. *American Civil Liberties Union,* 542 U. S. 656, 660.

Content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.

Absent from these few categories is any general exception for false statements. The Government argues that cases such as *Hustler Magazine, Inc.*, v. *Falwell*, 485 U. S. 46, 52, support its claim that false statements have no value and hence no First Amendment protection. But all the Government's quotations derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement. In those decisions the falsity of the speech at issue was not irrelevant to the Court's analysis, but neither was it determinative. These prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation or fraud, the Court has instructed that falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood. See *New York Times* v. *Sullivan*, 376 U. S. 254, 280. Here, the Government seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression.

The Government's three examples of false-speech regulation that courts generally have found permissible do not establish a principle that all proscriptions of false statements are exempt from rigorous First Amendment scrutiny. The criminal prohibition of a false statement made to Government officials in communications concerning official matters, 18 U. S. C. §1001, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context. As for perjury statutes, perjured statements lack First Amendment protection not simply because they are false, but because perjury undermines the function and province of the law and threatens the integrity of judgments. Finally, there are statutes that prohibit falsely representing that one is speaking on behalf of the Government, or prohibit impersonating a Government officer. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here. While there may exist "some categories of speech that have been historically unprotected," but that the Court has not yet specifically identified or discussed, *United States* v. *Stevens,* 559 U. S. ___, ___, the Government has not demonstrated that false statements should constitute a new category. Pp. 3–10.

(b) The Act seeks to control and suppress all false statements on this one subject in almost limitless times and settings without regard to whether the lie was made for the purpose of material gain. Permitting the Government to decree this speech to be a criminal offense would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Pp. 10–11.

(c) The Court applies the "most exacting scrutiny" in assessing content-based restrictions on protected speech. *Turner Broadcasting System Inc.* v. *FCC,* 512 U. S. 622, 642. The Act does not satisfy that scrutiny. While the Government's interest in protecting the integrity of the Medal of Honor is beyond question, the First Amendment requires that there be a direct causal link between the restriction imposed and the injury to be prevented. Here, that link has not been shown. The Government points to no evidence supporting its claim that the public's general perception of military awards is diluted by false claims such as those made by respondent. And it has not shown, and cannot show, why counter speech, such as the ridicule respondent received online and in the press, would not suffice to achieve its interest.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *Ashcroft,* 542 U. S., at 666. Here, the Government could likely protect the integrity of the military awards system

by creating a database of Medal winners accessible and searchable on the Internet, as some private individuals have already done. Pp. 12–18.

JUSTICE BREYER, joined by JUSTICE KAGAN, concluded that because the Stolen Valor Act, as presently drafted, works disproportionate constitutional harm, it fails intermediate scrutiny, and thus violates the First Amendment. Pp. 1–10.

(a) In determining whether a statute violates the First Amendment, the Court has often found it appropriate to examine the fit between statutory ends and means, taking into account the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the statute will tend to achieve those objectives, and whether there are other, less restrictive alternatives. "Intermediate scrutiny" describes this approach. Since false factual statements areless likely than true factual statements to make a valuable contribution to the marketplace of ideas, and the government often has good reason to prohibit such false speech, but its regulation can threaten speech-related harm, such an approach is applied here. Pp. 1–3.

(b) The Act should be read as criminalizing only false factual statements made with knowledge of their falsity and with intent that they be taken as true. Although the Court has frequently said or implied that false factual statements enjoy little First Amendment protection, see, *e.g., Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, those statements cannot be read to mean "no protection at all." False factual statements serve useful human objectives in many contexts. Moreover, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart. See *id.*, at 340–341. And the pervasiveness of false factual statements provides a weapon to a government broadly empowered to prosecute falsity without more. Those who are unpopular may fear that the government will use that weapon selectively against them.

Although there are many statutes and common-law doctrines making the utterance of certain kinds of false statements unlawful, they tend to be narrower than the Act, in that they limit the scope of their application in various ways, for example, by requiring proof of specific harm to identifiable victims. The Act lacks any such limiting features. Although it prohibits only knowing and intentional falsehoods about readily verifiable facts within the personal knowledge of the speaker, it otherwise ranges broadly, and that breadth means that it creates a significant risk of First Amendment harm. Pp. 3–8.

(c) The Act nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. P. 8.
(d) It may, however, be possible substantially to achieve the Government's objective in less burdensome ways. The First Amendment risks flowing from the Act's breadth of coverage could be diminished or eliminated by a more finely tailored statute, for example, a statute that requires a showing that the false statement caused specific harm or is focused on lies more likely to be harmful or on contexts where such lies are likely to cause harm. Pp. 8–10.

Reichle v. Howards, 11-262. The Court held that two secret service agents had qualified immunity from suit under 42 U.S.C. §1983 for claims alleging a retaliatory arrest for exercising First Amendment rights, where the agents had probable cause to make the arrest under the Fourth Amendment. A Secret Service detail, which included petitioners Gus Reichle and Dan Doyle, accompanied then-Vice President Cheney while he greeted members of the public at a shopping mall. Agent Doyle told several other agents that he overheard respondent Steven Howards say on a cell phone that "I'm going to ask [the Vice President] how many kids he's killed today." Several agents therefore kept close watch on Howards and observed as he approached the Vice President, told him that his "policies in Iraq are disgusting," and touched the Vice President's shoulder. Agent Reichle then approached Howards, showed him his badge, and asked to speak with him. Howards refused and tried to walk away, but Agent Reichle stepped in front of him and asked "if he had assaulted the Vice President." Howards denied even touching Vice President Cheney. Reichle arrested Howards and transferred him to the local sheriff's department where he was charged with harassment, a state-law charge that was later dropped. Howards filed suit under §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents*, 430 U.S. 388 (1971), alleging that the agents arrested him without probable cause in violation of the Fourth Amendment and in retaliation for criticizing the Vice President in violation of the First Amendment. Petitioners moved for summary judgment on qualified immunity grounds, but the district court denied the motion. On interlocutory appeal, the Tenth Circuit held that petitioners enjoyed qualified immunity from the Fourth Amendment claim because they had probable cause to arrest Howards for violating 18 U.S.C. §1001 by falsely denying touching the Vice President. But the court denied qualified immunity on the First Amendment claim. In an opinion by Justice Thomas, the Court reversed.

In *Hartman v. Moore*, 547 U.S. 250 (2006), the Court held that probable cause to arrest defeats a First Amendment retaliatory-*prosecution* claim. The Tenth Circuit concluded that *Hartman* did not upset a prior Tenth Circuit precedent holding that probable cause does not defeat a First Amendment retaliatory-*arrest* claim. In reversing the Tenth Circuit, the Court declined to decide the merits question whether probable cause to arrest does, in fact, defeat a First Amendment retaliatory-arrest claim. Rather, the Court held that petitioners are entitled to qualified immunity because the law was not clearly established at the time of the arrest. The Court first found that it has never recognized a First Amendment right to be free from a retaliatory arrest that is based on probable cause. True, it has recognized that the First Amendment generally prohibits government officials from retaliating against persons for exercising their First Amendment rights. But, held the Court, the right at issue here is more specific: "to be free from a retaliatory arrest that is otherwise supported by probable cause. The Court has never held that there is such a right."

The Court next held that, even if "controlling Court of Appeals' authority could be a dispositive source of clearly established law," the Tenth Circuit's cases did not satisfy that standard here. In particular, the Court disagreed with the Tenth Circuit's conclusion that *Hartman* had no affect on prior Tenth Circuit precedent governing retaliatory arrests. "Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests." The Court explained that "*Hartman* was decided against a legal backdrop that treated retaliatory arrest and prosecution claims similarly." And, found the Court, some of *Hartman*'s reasoning applies to retaliatory arrests. Specifically, in both retaliatory prosecution and retaliatory arrest cases, evidence of the presence or absence of probable cause will be available in most cases; and the existence of probable cause "could be thought similarly fatal to a plaintiff's claim that animus caused his arrest." Although an officer might have animus toward a suspect's speech, "the officer may decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat," thus weakening the connection between the alleged animus toward the speech and its "wholly legitimate consideration." The Court made clear that it was not extending *Hartman*'s rule to arrests; it was merely showing that it arguably can be extended to retaliatory-arrest claims. "Accordingly, when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to First Amendment violation."

Justice Ginsburg concurred in the judgment through an opinion joined by Justice Breyer. She stated that were the defendants "ordinary law enforcement officers," she would hold that they would not be entitled to qualified immunity. In her view, *Hartman* relied on the "distinct problem of causation" that arises in retaliatory prosecution cases, where the defendant is a person who convinced another person (the prosecutor) to act. "A similar causation problem will not arise in the typical retaliatory-arrest situation." She nevertheless concurred in the Court's judgment because of the special role performed by officers assigned to protect public officials, who "must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy." (Justice Kagan did not participate in the case.)

4th Amendment

Arizona v. United States, 11-182. By a 5-3 vote, the Court struck down as preempted three provisions of an Arizona law targeting illegal immigration; and without dissent rejected the federal government's pre-enforcement challenge to a fourth provision. Specifically, the Court held that §3 of Arizona's statute, which makes it a state-law crime to fail to comply with federal alien-registration requirements, is preempted because Congress has fully occupied the field of alien registration. The Court next held that the federal law imposing sanctions on *employers* who hire illegal immigrants impliedly preempts §5(c), which attacked the issue on the *employee* side by making it a state crime for illegal immigrants to apply for or attain a job in Arizona. The Court also invalidated §6, which authorized state officials to arrest without a warrant persons unlawfully in the country if officials believe they have committed a deportable offense. The Court found that §6 creates an obstacle to federal law, which creates a different regime governing when removable aliens may be arrested. Lastly, the Court held that the Ninth Circuit erred in enjoining the operation of §2(b) before it took effect. That section requires state and local law enforcement officers to check the immigration status of persons whom they have lawfully detained. The Court held that the mandatory nature of the status checks does not interfere with the federal immigration scheme, which encourages federal-state communication. The Court added, however, that §2(b) in practice may raise constitutional concerns by delaying the release of detainees for no reason other than to check their immigration status.

United States v. Jones, 10-1259. Without dissent, the Court held that federal agents conducted a search, within the meaning of the Fourth Amendment, when they installed a global positioning system (GPS) tracking device on the undercarriage of the respondent's car and then monitored the car's movements for 28 days. District of Columbia police and the FBI suspected that respondent Antoine Jones was involved in drug trafficking. They obtained a warrant to install a GPS device on the underside of the Jeep Grand Cherokee Jones drove, but they installed the GPS after the warrant had expired and in a public parking lot in Maryland even though the warrant specified D.C. Over the next 28 days, the officers used to devise pinpoint the Jeep's location within 50-100 feet. With that information, the government tied Jones to his co-conspirator's "stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base." The government indicted Jones, who moved to suppress evidence obtained through the GPS. The district court granted the motion in part, suppressing only the data obtained while the vehicle was parked in a particular parking lot. The government eventually obtained a conviction, and the court sentenced Jones to life in prison. The D.C. Circuit reversed the conviction, finding that the evidence obtained from the GPS device was admitted in violation of his Fourth Amendment rights. In an opinion by Justice Scalia, the Court Affirmed.

The 5-Justice majority opinion held that "[t]he Government physically occupied private property for the purpose of obtaining information." And "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." The Court pointed to Framing Era cases explaining "the significance of property rights in search-and-seizure analysis"; stated that the Fourth Amendment's text "reflects its close connection to property"; and found that the Court's "fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." The Court acknowledged that later cases have applied the "reasonable expectation of privacy" analysis set forth in Justice Harlan's concurrence in *Katz v. United States,* 389 U.S. 347 (1967), but held that the *Katz* test is "not the sole measure of Fourth Amendment violations." The Court discussed several post-*Katz* cases that it believed applied a property-rights approach to the Fourth Amendment; and it disagreed with the United States' contention that several other post-*Katz* cases foreclosed such an approach.

The Court disagreed with Justice Alito's concurring opinion's characterization of it as applying "18th-century tort law." "What we apply is an 18th –century guarantee against unreasonable searches, which we believe must provide at a minimum the degree of protection I afforded when it was adopted." The Court noted that it is not making "trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." Finally, the Court noted that it is the concurring opinion that creates thorny new problems by proposing that the answer to whether GPS monitoring produces a search depends on how long the monitoring was (but how long is too long?) and the nature of the offense (but how serious must the offense be?). Because the United States did not press it below, the Court did not consider the United States' alternative contention that the search here "was reasonable – and thus lawful – under the Fourth Amendment because" the officers had probable cause to believe Jones was involved in a large-scale drug distribution conspiracy.

Justice Alito concurred in the judgment, in an opinion joined by Justices Ginsburg, Breyer, and Kagan. Justice Alito strongly disagreed with the majority's view that "any technical trespass followed by the gathering of evidence constitutes a search." He stated that the old "trespass-search based rule," which initially produced a decision holding that wiretapping a home phone was not a search, "was repeatedly criticized" and that *Katz v. United States*... finally did away with the old approach: it focuses on the minor intrusion of attaching a small object under a car, rather than the *use* of the GPS; "under the Court's theory, the coverage of the Fourth Amendment may vary from State to State" based on the varying states' property laws; and relying on the law of trespass provides no help in dealing with cases that involve purely electronic monitoring. Justice Alito acknowledged that there are challenges to applying the *Katz* "reasonable expectation of privacy" test to new technologies and that "technology can change" the privacy expectations of a "hypothetical reasonable person." He therefore suggested that, as with wiretapping, the best way to adjust to changing attitudes about privacy is through legislative changes.

Absent such legislation, "[t]he best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." Justice Alito concluded that "relatively short-term monitoring of a person's movements on public streets"

would not constitute a search, but that "the use of longer term GPS monitoring of investigations of most offenses impinges on expectations of privacy." That is because "[f]or most offenses, society's expectation has been that law enforcement agents and others would not – and indeed, in the main simply could not – secretly monitor and catalogue every single movement of an individual's car for a very long period." Justice Alito declined to "identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark."

Justice Sotomayor filed a concurring opinion, agreeing both with the majority opinion (which she joined) that a search occurs "[w]hen the Government physically invades personal property to gather information," and with Justice Alito that "longer term GPS monitoring of investigations of most offenses impinges on expectations of privacy" under the *Katz* test. (Accordingly, five Justices reached the latter conclusion.) Justice Sotomayor stated that "particular attention" will need to be given to "some unique aspects of GPS surveillance": its generation of "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations," which can be stored and easily reviewed at little cost to the government. She noted how that could "chill[ ] associational and expressive freedoms," and readily be abused. She also stated that, given the amount of information people reveal about themselves in "the digital age," it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

Florence v. Board of Chosen Freeholders of County of Burlington, 10-945. By a 5-4 vote, the Court held that the Fourth Amendment was not violated by a county jail's policy of strip searching every detainee placed in the general jail population, including persons arrested for minor offenses. In 1998, petitioner Albert Florence was arrested after fleeing from police officers in Essex County, New Jersey, and charged with obstruction of justice and use of a deadly weapon. Florence pleaded guilty to two lesser offenses and was sentenced to pay a fine. Florence failed to pay his fine and failed to appear at a hearing. A bench warrant was thus issued for his arrest in 2003. Although Florence paid the outstanding fine less than a week later, the warrant remained in the statewide database. In 2005, Florence and his wife were stopped in their car by a state trooper. The trooper arrested Florence due to the (supposed) outstanding warrant and took him to the Burlington County Detention Center, where he was held

in the general population. Six days later, he was transferred to the Essex County Correctional Facility and held in the general population, but released the next day. Prior to being held in the Burlington facility, Florence was checked by officials for scars, marks, gang tattoos, and contraband as he disrobed. He then showered with a delousing agent. Florence claimed that he also was made to open his mouth, lift his tongue, hold out his arms, and lift his genitals. Florence also claimed that at the Essex County facility he was required to undress, lift his genitals, turn around, and cough in a squatting position. He was also required to shower. Florence sued various government defendants in federal court under §1983 for Fourth and Fourteenth Amendment violations. He contended that persons arrested for minor offenses should not be subjected to strip or body cavity searches unless the officials had a particular reason to suspect the inmate of concealing a weapon or contraband. The district court agreed, but the Third Circuit reversed. In an opinion by Justice Kennedy, the Court affirmed.

The Court stated that under precedents such as *Turner v. Safley*, 482 U.S. 78 (1987), a regulation that may impinge on an inmate's rights must be upheld "if it is reasonably related to legitimate penological interests." The Court applied that framework to searches and seizures in *Bell v. Wolfish*, 441 U.S. 520 (1979), where (in upholding the search of prisoners' visitors) the Court ruled that "[t]he need for a particular search must be balanced against the resulting invasion of personal rights." Still other cases establish that "correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." With that background, the Court concluded that the question here was whether the ordinary deference given to prison officials is overcome by "substantial evidence" showing that the strip search policies at issue were an "exaggerated" response to the officials' security concerns. The Court held that Florence failed to make that showing.

The Court first emphasized the important interests served by strip searches, which not only discover contraband but also "deter the smuggling of weapons, drugs, and other prohibited items inside." The searches also help identify gang members by their tattoos and help determine whether an inmate has a contagious disease, or any injuries or illnesses that require treatment. The Court then rejected Florence's proposal that new detainees convicted of minor offenses may be strip searched only if officers have individualized, reasonable suspicion that they are hiding contraband. The Court pointed out that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals"; there are examples of people

arrested for minor crimes trying to smuggle contraband into prisons; minor offenders may be coerced into smuggling contraband into prisons; and it "may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search." In addition to line-drawing problems, the officers conducting the search may not have access to the arrestee's criminal history records. The Court added that inmates could be expected to adapt to any loopholes created by the courts to undermine the rules and safety of the institutions.

Justice Kennedy's opinion noted (in a part joined by only four Justices) that its ruling did not encompass strip searches in which detainees' private parts are touched, or to inmates not placed into the general population or "without substantial contact with other detainees." "The accommo-dations provided in these situations may diminish the need to conduct some aspects of the searches at issue." Chief Justice Roberts filed a brief concurring opinion to emphasize the importance of this part of Justice Kennedy's opinion, and "the possibility of an exception to the rule [the opinion] announces." Justice Alito also wrote a separate concurring opinion emphasizing that the Court's opinion is limited to arrestees who are transferred to the general prison population and noting that strip searches of arrestees not transferred to the general population might be unreasonable. (Indeed, he suggests that it may not be reasonable to transfer to the general population certain persons arrested for minor offenses.)

Justice Breyer wrote a dissenting opinion, which Justices Ginsburg, Sotomayor, and Kagan joined. He stated that, given the serious intrusion on privacy by strip searches — which are "inherently harmful, humiliating, and degrading" — the record did not justify the Court's deference to the jail officials. In particular, he noted that jail officials already take measures (such as frisking, using metal detectors, requiring inmates to shower, searching clothing) to detect injuries, diseases, or tattoos. Plus, Florence conceded that officers may view detainees during showering for security purposes. Justice Breyer found no empirical evidence that the additional, disputed aspects of the strip search — "the genital lift and the 'squat and cough'" — were needed for those purposes or to detect contraband. After discussing some statistics showing how rarely strip searches uncovered contraband, the dissent stated that "neither the majority's opinion nor the briefs set forth any clear example of an instance in which contraband was smuggled into the general jail population during intake that could not have been discovered if the jail was employing a reasonable suspicion standard."

Ryburn v. Huff, 11-208. Through a unanimous *per curiam* opinion, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity to two police officers who were sued under §1983 for entering a house without a warrant because they were concerned about an imminent threat of violence. The officers were investigating a report from a school principal that a student, Vincent Huff, had "written a letter threatening to 'shoot up' the school." The officers learned that Huff had been the victim of bullying and had been absent from school for two days, warning signs common in school shooting cases. One student reported that he believed Huff was capable of carrying out the threat. When the officers went to the Huff's home to investigate, they knocked and announced who they were, but no one answered the door or their subsequent phone calls. When the officers called Mrs. Huff's cell phone, she answered and reported she was in the house, but then hung up abruptly when the officer asked her to come outside to speak with him. Moments later, Mrs. Huff and Vincent came outside, but when officers asked to speak with them inside about the threats, she refused. When the officers asked Mrs. Huff if there were weapons in the house, she turned around and ran inside. One officer, Sergeant Ryburn, fearing for his safety, followed her; Vincent followed him; and Officer Zepeda entered after Vincent out of concern for "officer safety." Two additional officers also went inside under the mistaken impression that the first two had been invited. Eventually, Mr. Huff entered the living room, where everyone else had gathered, and challenged the officers' authority to be there. After 5 to 10 minutes of discussion, the officers left. They ultimately determined that the rumor was false.

The Huffs sued under 42 U.S.C. §1983, alleging that the officers violated their Fourth Amendment rights by entering their home without a warrant. After a two-day bench trial, the district court ruled that the officers were entitled to qualified immunity because reasonable officers could have believed there were weapons in the house and that Huff family members or the officers were in danger. The Ninth Circuit affirmed as to the two officers who entered the house believing they had been invited. But it reversed with respect to Officers Ryburn and Zepeda, finding that "any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable" given that "[Mrs. Huff] merely asserted her right to end the conversation with the officers and returned to her home." The Supreme Court reversed the Ninth Circuit's holding with respect to Officers Ryburn and Zepeda,

holding that "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case."

The Court observed that its precedent establishes "that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." The Court then criticized the Ninth Circuit majority, which "— far removed from the scene and with the opportunity to dissect the elements of the situation — confidently concluded that the officers really had no reason to fear for their safety or that of anyone else." The Court pointed to four flaws in the Ninth Circuit's reasoning. First, although it "purported to accept the findings of the District Court, it changed those findings in several key respects," particularly, the district court's finding that Mrs. Huff "immediately turned around and ran into the house." Second, the Ninth Circuit erred when it apparently concluded "that conduct cannot be regarded as a matter of concern so long as it is lawful," such as Mrs. Huff's responding to the question whether there were any guns in the house by running into the house. Third, the "majority looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern." But, held the Court, "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." Finally, the Ninth Circuit did not heed the "admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation."

Messerschmidt v. Millender, 10-704. The Court reversed a Ninth Circuit decision that had denied qualified immunity to police officers who obtained a facially valid, but possibly overbroad, warrant to search respondents' home. Detective Curt Messerschmidt investigated a domestic incident involving Shelly Kelly and her former boyfriend, Jerry Ray Bowen, whom she identified as an active member of a local street gang. Kelly reported that when she ended her relationship with Bowen, he physically assaulted her, threatened to throw her over the railing of a second-story landing, bit her, and attempted to drag her outside by her hair. She escaped to her car. Bowen appeared with a sawed-off shotgun, pointed it at her, and said that if she tried to leave he would kill her. She sped away as Bowen fired five shots at her car, blowing out a tire. Kelly reported the incident to police. Kelly told Detective Messerschmidt that Bowen was staying at the home of his foster mother, respondent Augusta Millender. Detective Messerschmidt conducted a background check on Bowen and confirmed his gang ties, the

address given, and his prior criminal history for violent and gun-related offenses, which spanned a 17-page criminal history. The detective prepared a warrant for Bowen's arrest and a second, nighttime search warrant for Bowen's foster mother's home. The search warrant sought, *inter alia*, all handguns, ammunition, gun parts, and any "articles of evidence showing street gang membership or affiliation with any Street Gang." His two affidavits attached to the warrant detailed: (1) his extensive experience investigating gang conduct; and (2) why he believed there was probable cause, including a detailed description of the domestic incident and the weapon Bowen used, and a description of the detective's background investigation. Detective Messerschmidt's supervisors and a deputy district attorney all reviewed and approved the search warrant. A magistrate authorized it. Two days later, Augusta Millender, and her daughter and grandson, were home when Detective Messerschmidt, Sergeant Lawrence, and other officers executed the warrant. The officers seized a shotgun, ammunition, and a letter addressed to Bowen from a state agency. Messerschmidt arrested Bowen two weeks later.

Alleging that the search warrant was unlawful and the search violated their Fourth Amendment rights, the Millenders filed suit in federal district court against the County of Los Angeles, the sheriff's department, and several individual officers including Detective Messerschmidt and Sergeant Lawrence. The district court rejected the officers' claim of qualified immunity. An *en banc* Ninth Circuit panel affirmed, finding that the warrant was overbroad because the affidavits and warrant failed to establish probable cause that firearms apart from the sawed-off shotgun, and gang-related material, were contraband or evidence of a crime. The court also held that the officers were not entitled to qualified immunity because "a reasonable officer in the deputies' position would have been well aware of [the] deficiency" in the warrant. In an opinion by Chief Justice Roberts, the Court reversed.

The Court reiterated that qualified immunity "generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." And in the Fourth Amendment context, the approval of a search warrant by a neutral magistrate generally demonstrates that the action was objectively reasonable. The Court noted, however, that it has recognized a narrow exception that applies when "it is obvious that no reasonably competent officer would have concluded that the warrant should issue." The Court rejected the Millenders' contention that this case fits within that exception. Addressing their contention that the warrant was overbroad for seeking all guns and

gun-related materials, the Court reasoned that, "given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned." The Court also found that a reasonable officer may have believed seizure of additional guns would help prevent a future assault on Kelly.

Addressing the Millenders' contention that the warrant was overbroad for seeking any materials related to gang-membership, the Court reasoned that the investigation involved more than a domestic dispute — as reported in the warrant, it was a case involving "a spousal assault *and* an assault with a deadly weapon." In that context, the Court stated, "[a] reasonable officer could certainly view Bowen's attack as motivated not by the souring of his romantic relationship with Kelly, but instead by a desire to prevent her from disclosing details of his gang activity to police." Evidence related to his gang membership could therefore be relevant to proving the case against Bowen for assaulting Kelly. The Court also noted that a reasonable officer might believe gang-membership evidence could "prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial," or helpful in "demonstrating Brown's connection to other evidence found" in the home, such as personal property with gang indicia on it. The Court further supported its conclusion with the facts that two supervisors and a deputy district attorney approved the warrant, and a neutral magistrate issued the warrant. This means that if Messerschmidt and Lawrence were "plainly incompetent," so too were the others. In the end, concluded the Court, whether or not the warrant was overbroad, "it was not so obviously lacking in probable cause that the officers could be considered 'plainly incompetent' for concluding otherwise."

Justice Breyer issued a brief concurring opinion. Justice Kagan issued an opinion concurring in part and dissenting in part, which stated that she agreed with the court with respect to the search for all gun or gun-related items, but would not have awarded immunity to the officers for their search for all gang-related items. She reasoned that gang membership is not a crime, and the warrant "lacked any explanation of how gang items would (or even might) provide evidence of the domestic assault the police were investigating." Nor did she agree with the Court's reliance on the warrant's approved by supervisors, a deputy district attorney, and a magistrate. In a dissent in which Justice Ginsburg joined, Justice Sotomayor "could not disagree more" with the majority's conclusion that the officers' conduct was "objectively

reasonable." She stated that the "Court's analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis." The dissent found from the record that the officers themselves believed the incident to be solely a domestic dispute and not gang-related. According to the dissent, the Court erred in "think[ing] different conclusions might be drawn from the crime scene that reasonably might have led different officers to search for different reasons," rather than focusing on the actions of the officers at issue.

4th Amendment – Cert Granted

Bailey v. United States, 11-770. The Court granted certiorari to determine whether under *Michigan v. Summers*, 452 U.S. 692 (1981), "police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed." On July 28, 2005, police officers obtained a warrant to search a basement apartment located at 103 Lake Drive. At around 10:00 pm that evening, two officers observed two men, including petitioner Chunon Bailey, exiting the gate at the top of the stairs that led down to the apartment. Both men matched the description of the person described in the warrant as occupying the apartment. The officers decided not to confront the men within view or earshot of the apartment, and instead watched as a car pulled out of the driveway and pulled down the block. After the car traveled about a mile from the house (about five minutes later), the officers pulled the car over. Upon being stopped, Bailey said that he was coming from his house at 103 Lake Drive. Bailey and the other man were brought back to 103 Lake Drive, where the officers seized drugs and a handgun, and arrested Bailey. Bailey was later charged and convicted of federal drug and firearm offenses. Prior to trial, Bailey argued that he was unlawfully detained and moved to suppress the keys that he turned over prior to his arrest and his statement to the officers that he lived at 103 Lake Drive. The district court denied the motion, and the Second Circuit affirmed. 652 F.3d 373.

In *Michigan v. Summers*, the Court upheld the detention of a person who was descending the front steps of his house while officers were preparing to execute a search warrant of the house. The Court found that the "incremental intrusion" caused by the detention is slight, and was justified by the interests in (1) preventing flight, (2) minimizing the risk of harm

to the executing officers, and (3) facilitating the orderly completion of the search. The issue here is whether police not only may detain an occupant *at* the premises during the execution of a search warrant, but may also detain a person who leaves the premises at that time. The Second Circuit identified a circuit split on this issue but concluded that *Summers* is properly extended to persons who have left the property. The court explained that the brief detention constitutes a *de minimis* intrusion, and that the law enforcement interests identified in *Summers* still apply. In particular, the court found that the contrary view forces officers either to detain an occupant as he leaves the premises, which risks alerting cohorts inside, or to let the occupant leave and risk being unable to detain him if evidence is found. The court stated that this "Hobson's choice" is particularly unnecessary when a judicial officer has already found probable cause to suspect the presence of criminality on the premises. And such a requirement would strip officers of their capacity to exercise "unquestioned command" during the warrant's execution. The Second Circuit therefore ruled that "*Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected as soon as practicable."

In his petition, Bailey argues that "[w]here an individual is detained away from the immediate vicinity of the premised to be searched, the resulting intrusion is correspondingly more substantial, and the rationales for the detention are correspondingly less so." The intrusion is greater, according to Bailey, because it is in a public place. And the government interests set out in *Summers* apply with less force, according to Bailey, because (1) the risk of flight is more attenuated because "the individual has already left the premises before the search has begun (and would therefore have no reason to know that a search is imminent)"; (2) an individual who has left the premises poses little risk of harm to the officers executing the warrant; and (3) pursuing an individual away from the premises does not facilitate the orderly completion of the search itself.

Florida v. Harris, 11-817. At issue is whether the Florida Supreme Court erred when it held that "an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle." Respondent Clayton Harris was arrested after a county sheriff's officer found a component used to make methamphetamine in his car, which was stopped for a traffic violation and subjected to a canine sniff. The dog alerted to the presence of drugs on the handle of the car. The officer searched

the car and found the contraband underneath the driver seat. At the motion to suppress, the officer testified as to his training and experience as a canine handler. He also testified that the dog had completed a 120-hour drug-detection training course and was certified as a drug-detection dog. The officer and the dog also completed a 40-hour training seminar, and the officer individually trains the dog four hours per week in detecting drugs. The testimony also revealed that the dog had a 100% "satisfactory performance." But the state did not provide any record of the dog's prior field performance at the hearing. The district court denied the motion to suppress and found there was probable cause to search the vehicle. Harris then entered a plea of no contest, reserving the right to appeal the denial of the motion. The state intermediate court of appeals affirmed, but the Florida Supreme Court reversed. 71 So. 3d 756.

The Florida Supreme Court found that the state's failure to provide the dog's prior field performance left the trial judge with an incomplete record to find the dog reliable and that such deficiency is the responsibility of the state, which has the burden of proof. The court expressly found that it would be inappropriate to place the burden on the defendant to rebut the evidence of the dog's credentials with prior field performance, since the state not only has the burden but is exclusively in control of such records. The court was particularly concerned about the presence of false alerts in the dog's history, the potential for handler error, and the past alerting to residual odors not leading to the finding of contraband. The court compared the need to prove the reliability of the dog with the need to establish the reliability of an informant. The court thus reversed the trial court's ruling that the state presented sufficient evidence to establish probable cause and ruled that the trial court should have granted the motion to suppress.

Florida argues in its petition that the U.S. Supreme Court has repeatedly stated that probable cause is established when a well-trained drug-detection dog alerts, without requiring further inquiry into its prior field performance. For that reason, explains Florida, other federal and state courts have repeatedly held that a showing of proper training satisfies the requirement that the drug dog be reliable. The state particularly challenges the Florida Supreme Court's concern regarding the potential for residual alerts (*i.e.*, that the dog might alert to the residual odor of drugs that are no longer present). Florida explains that "[a] dog's superior sense of smell allows it to detect trace amounts and residual odors of a drug that may remain after the odor-emanating drug is no longer present." As a consequence, "when a dog alerts and drugs are not located, there is no way to determine whether the dog alerted to a residual odor or the

alert was due to handler error." For this reason, a dog's performance records are not a proper gauge of a dog's reliability.

5th Amendment / Miranda

Bobby v. Dixon, 10-1540. In a *per curiam* opinion, the Court held that the Sixth Circuit erred when it granted habeas relief to respondent Archie Dixon based on purported *Miranda* and Fifth Amendment violations. Dixon and an accomplice, Tim Hoffner, murdered Chris Hammer by beating him, tying him up, and burying him alive. While investigating, the police had several encounters with Dixon, three of which are relevant here. First, on November 4, 1993, the police happened to see Dixon when he went to a local police station to resolve a traffic violation. After advising Dixon of his *Miranda* rights, a detective asked to speak to him about Hammer, but Dixon refused to answer any questions without his lawyer present. Several days later, the police discovered that Dixon had sold Hammer's car and forged his signature when cashing the check. The police arrested Dixon for forgery on November 9 and, after deliberately choosing not to give *Miranda* warnings, interrogated him intermittently over several hours, for about 45 minutes total. During this interrogation, Dixon freely admitted to the forgery but claimed that he did not know where Hammer was and that Hammer had given him permission to sell the car. The police replied that Hoffner was providing more useful information and urged Dixon to be the first one to "cut a deal." Dixon continued to insist that he had nothing to do with Hammer's disappearance, and, at about 3:30 p.m., the police ended the interrogation and took Dixon to a jail where he was booked on forgery. Meanwhile, that same afternoon, Hoffner led police to Hammer's grave. The police then had Dixon transported back to the station; he arrived there at about 7:30 p.m. and stated, "I talked to my attorney, and I want to tell you what happened." This time the police issued *Miranda* warnings, after which Dixon waived his rights and confessed to murdering Hammer. He was later convicted of murder and sentenced to death. Affirming both the conviction and sentence, the Ohio Supreme Court held that Dixon's confession to murder was admissible because it, and his prior, unwarned confession to forgery were both voluntarily given. The Sixth Circuit granted habeas relief, identifying three rulings of the Ohio court that were purportedly contrary to or clear misapplications of Supreme Court law, as required AEDPA. The Court unanimously reversed.